Filed 2/22/10 Adams v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LYNN ADAMS,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

QUIKSILVER, INC. et al.,

Real Parties in Interest.

G042012

(Super. Ct. No. 30-2008-00114462)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Petition granted.

Kirtland & Packard, Robert M. Churella, Robert K. Friedl and Behram V. Parekh for Petitioner.

Allen Matkins Leck Gamble Mallory & Natsis, Dwight L. Armstrong and Maria Z. Stearns for Real Parties in Interest.

* * *

Lynn Adams filed an action against her former employer, Quiksilver, Inc., and two of its managers, Randy McClelland and Dewey Doan (collectively referred to as Quiksilver), seeking damages for wrongful termination in violation of public policy. Claiming Adams had signed an electronic arbitration agreement, Quiksilver filed a motion to compel arbitration of the complaint, and briefs were submitted by both sides. On the date set for argument on the motion, the trial court stated its desire to "hold[] a brief evidentiary hearing as to whether the plaintiff made the electronic signatures on pages 9 and 12 of the Talent-Gateway form." After the hearing, the trial court granted the motion.

Adams filed this petition for extraordinary relief, seeking the issuance of a writ of mandate directing the superior court to enter an order denying the motion to compel arbitration. She claims she never agreed to arbitrate claims against Quiksilver and she never signed the electronic document containing the arbitration clause, thus the trial court erred when it found there was a valid arbitration agreement. We grant the petition.

FACTS

Adams applied for employment as a store manager with Quiksilver in January 2008. She did not fill out a Quiksilver application but submitted her resume on the Internet through a job search Web site. She interviewed with several Quiksilver employees, including McClelland and Doan, after which she was told she "had the job pending my background check." On April 9, 2008, McClelland called her and said "[h]e needed my middle name for my background check and my social security number. [¶] . . . [¶] I gave him my middle name on the phone, and I started to tell him my social security. He asked me to text it to him because he was driving his car." On April 10,

McClelland e-mailed Adams a link to an electronic form, which he asked her to "edit" that day because "they could not do a background check without this information."

The form was entitled "Talent-Gateway – External Talent Gateway for ADAMS, LYNN." When Adams opened the form, she saw that some of the information had already been filled in. She scrolled through the form, adding requested additional information about her education and employment history, then came to a phrase in capital letters: "NOTICE AND AUTHORIZATION FOR A CONSUMER REPORT, CONSUMER CREDIT REPORT AND/OR INVESTIGATIVE CONSUMER REPORT." After several paragraphs of disclosures and explanations of her rights, the form stated: "By typing my name, I fully understand the above Notice and Authorization." Her full name, Lynn Lorene Adams, was already typed in next to the directive: "Type Full Legal Name." The form continued, "The following information is required by law enforcement agencies and other entities for identification purposes when checking records." She filled in her driver's license number and previous residences. She did not see or read the next part of the form, which contained an arbitration agreement. No one told her the form contained an arbitration agreement. Her full name appears at the end of the section containing the arbitration agreement, which is the end of the document. Adams testified she did not type her name there.

Adams testified she does not remember if she scrolled all the way to the end of the form or if she clicked the "save" button. She was rushing because McClelland needed the information by 5:00 p.m. that day, and she "kept escaping the document hoping I was done . . . . And every time I escaped it brought another required field, so I don't remember how I escaped . . . ." She explained, "It's like when you exit and it says you didn't finish it, there's a required field still and you have to go back and do the red asterisked boxes. It was doing that, which was indicating it wasn't done. And I kept trying to just be done so I [could] get it done by 5:00 and get it back." She was sure the field that required her to type her full legal name did not come up. She was also sure she

did not type in her full legal name "[b]ecause I never use my middle name. Even when I do my . . . full legal signature on checks or anything, even all my employment documents I sign[ed] with Quiksilver, I never sign my full name, ever."

On her first day of work at Quiksilver, Adams physically signed numerous employment documents, including as a W-4 form, a direct deposit authorization, an employee personal information form, and an "at-will" policy acknowledgment form. None of the forms contained an arbitration clause. All were signed "Lynn Adams."

McClelland testified he did not enter or change any information on Adams's Talent-Gateway form. He did not know he was able to edit her form in April 2008, nor did he know how to do so, although by the time of the hearing he knew he could have edited the form. He agreed some parts of the form were filled in when he sent it to Adams. He told her the purpose of the information requested by the form was "to do the reference checks . . . ." He asked her for her social security number, but not her middle name, before he e-mailed her the e-link. When he got the social security number, he "e-mailed Nicole Semyer in our human resources department, and I provided her Lynn's name, her social security number and the rec number to go ahead and start the background check at that point." McClelland never told Adams there was an arbitration provision in the reference check form; in fact he did not know it himself. He knew he could send the form to anyone by clicking on an e-link button and typing in an e-mail address.

Barrett Richardson, an employee of Kenexa and the person most knowledgeable about the Talent-Gateway form, testified that the form was part of a product created by Kenexa called Recruiter Brass Ring. The Brass Ring "is a hosted online application that allows our clients to do applicant tracking and recruiting and includes employment online application." The Talent-Gateway form "is a collection of questions that one may use in association with an application process for online employment application." The form could be opened and edited by anyone who received

the e-link. "[A]nybody who that e-mail was forwarded to, copied to, sent to, stolen off the computer from, taken from a Blackberry, anybody who had access to that e-link would be able to open the document. . . ." At the end of the document, there were three options: clear, close, or save. If "save" was selected, the data would be submitted to the online system. If the applicant merely exited the form, no data would be recorded. Richardson testified there was no way Adams could have submitted her form without scrolling to the bottom of the document and selecting "save."

Richardson testified the Brass Ring system was designed so that a prospective applicant would go to the Web site of the prospective employer and access the employment application, hosted by Kenexa. The applicant would then need to log in by creating a login identifier for him or herself. Then the applicant would be allowed to fill in the online forms. The applicant's data would be stored on Kenexa's Web site. The prospective employer would be able to log in as a user and access the applicant's data in a view-only mode.

Richardson testified that Kenexa's database tracks the identity of each user who could have made changes to Adams's form, but does not identify whether a user actually made changes to it. The only two identified individuals who accessed the form were McClelland and Timothy Baga, a former Quiksilver employee. Other than someone who may have accessed the form through the e-link, which includes Adams, they were the only two individuals who could have completed the electronic signature section.

Adams testified she had heard Baga's name but had never met him. She had no idea how he would know her middle name. Her full name, including her middle name, is on her social security card.

The trial court redefined the issue at the beginning of the hearing: "We're here for an evidentiary hearing on whether the plaintiff made electronic signature on pages 9 and 12 of the Talent-Gateway form. [¶] That's a very narrow issue . . . ." At the end of the hearing, during Adams's testimony about whether she knew there was an

arbitration agreement in the Talent-Gateway form, the trial court interrupted: "Okay. Counsel, this is not getting to the point. I'm not concerned about the arbitration – the motion to compel arbitration generally, only with respect to whether or not she filled in her electronic signature on pages 9 and 12. [¶] So whether she read the arbitration agreement is not what is at issue in this hearing. Okay?"

After argument, the trial court took the matter under submission. A week later, it issued its decision: "The motion to compel is granted. The court . . . finds, pursuant to the evidence presented at the evidentiary hearing, that an agreement exists to arbitrate the disputes that have arisen between the parties and that no ground exists to revoke the agreement. Accordingly, litigation of this case is stayed."

DISCUSSION

Adams contends there is no substantial evidence to support the trial court's finding that she entered into an agreement to arbitrate her claims against Quiksilver. She argues there is no evidence she typed in the electronic signature and, even if she did, there is no evidence she actually agreed to arbitrate. We agree.

Civil Code section 1633.9, enacted in 1999 as part of a new chapter on electronic transactions, provides: "(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. . . ."

Adams points to the following undisputed facts: Some of the fields on the form were filled in by someone other than herself before the form was sent to her for editing. Both McClelland and Baga had access to the form and the ability to edit it before she received it. There was no testimony from Baga.[1] Adams did not create a login for

[1] Quiksilver contends Baga was in the courtroom and ready to testify that he did not complete the electronic signature nor did he know how to do so. But no offer of proof is in the record.

herself. Anyone who received the original e-mail to Adams with the e-link to the form could have opened it and edited it. The only way to exit the form and send the data to the system was to click on "save" at the bottom of the form. McClelland obtained Adams's social security number the day before he sent her the form; her social security record bears her full legal name. There is no electronic record of when Adams's full legal name was entered in the space following the arbitration agreement.

The following facts are disputed: Adams denied typing in her name, as did McClelland. Adams testified she told her full legal name to McClelland; he claims he did not know her middle name until the commencement of this lawsuit. In Adams's declaration, she claimed she did not scroll down to the arbitration agreement at the bottom of the document, but she was allowed to save her data and exit. At the hearing, she testified she did not remember whether she scrolled all the way down.

Under section 1633.9, Quiksilver had the burden to prove Adams's electronic signature to the arbitration agreement was her act by a preponderance of the evidence. A preponderance of the evidence standard "'"requires the trier of fact to 'believe that the existence of a fact is more probable than its nonexistence . . . .'"'" (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.) The trial court found Quiksilver met that burden. We review the trial court's finding for substantial evidence. When we do so, we "view[] the evidence and resolv[e] all evidentiary conflicts in favor of the prevailing party and indulg[e] all reasonable inferences to uphold the judgment. [Citation]. The issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact. [Citation.] Credibility is an issue of fact for the trier of fact to resolve [citation], and the testimony of a single witness, even a party, is sufficient to provide substantial evidence to support a factual finding [citation]." (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 170-171.)

We find the evidence is not sufficient to tip the scales in favor of Quiksilver. It presented no affirmative evidence that Adams filled in her full legal name on the form. While the trial court apparently disbelieved her denial, the only evidence offered to contradict her denial was Richardson's testimony that she had to scroll all the way to the bottom of the form and click on "save" to exit the form and send her data to Kenexa. Evidence that Adams scrolled to the bottom of the form and clicked on "save" is not evidence that she typed in her full legal name.

Furthermore, Kenexa's security procedure did not operate here to make it more likely than not it was Adams who typed in the electronic signature. She did not access the application from Quiksilver's Web site but submitted her resume to Quiksilver through a job search Web site. Thus, she never created a login identifier for herself on Kenexa's system. Her first access to the Kenexa form was through the e-link sent to her by McClelland. Because the form was partially filled out when she received it, someone else must have created a login identifier to access the form.

Even if we uphold the trial court's finding that Adams filled in her full legal name on the form, we cannot uphold its finding that there was a valid agreement to arbitrate. Although a person's signature on a contract is generally deemed to be assent to all its terms, notwithstanding the failure to read it before signing, "'[a]n exception to [the] general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term. [Citations.]' [Citation.]" (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 702.)

Here, the form was titled "Talent-Gateway – External Talent Gateway for ADAMS, LYNN." Adams was told the information on the form was needed for a background check and that it was needed quickly. There was no indication the form was going to operate as a binding agreement. The arbitration agreement is located in a section at the end of the form entitled "CERTIFICATION – PLEASE READ CAREFULLY." It

is placed between a paragraph acknowledging the employee's at-will status and a statement applicable to residents of Maryland and Massachusetts regarding a lie detector test. Following the lie detector verbiage, there is a certification that "all of the information contained in this Application for Employment is true, correct and complete to the best of my knowledge. . . ." Then there is the directive to "type full legal name," which is followed by a shift availability chart.

This is another example of an employer burying a predispute arbitration agreement in paperwork that does not facilitate an informed choice on the part of the employee. (See *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238.) Had Quiksilver truly wanted Adams to read the arbitration agreement and understand that she was waiving her right to a jury trial, it would have presented her with a document clearly indicating its nature and effect.

DISPOSITION

Adams's petition is granted. Let a writ issue directing the trial court to vacate its order granting the motion to compel arbitration and enter a new order denying the motion. Adams is awarded costs.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.